



Indiana Department of Education

SUPPORTING STUDENT SUCCESS

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The Quarterly Report provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at kmcdowel@doe.in.gov.

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VIDEOTAPE SURVEILLANCE AND EXPECTATIONS OF PRIVACY

In *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967), the U.S. Supreme Court reversed Katz's conviction for interstate wagering. He had been convicted based on the FBI's surreptitious recording of his conversations over a public telephone.¹ Even though the telephone was a public one, Katz still had a reasonable expectation that his telephone conversations would be private. "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. at 353, 88 S. Ct. at 512.

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

389 U.S. at 351-52, 88 S. Ct. at 511. This creates a two-fold requirement: (1) A person must have an actual, even if subjective, expectation of privacy; and (2) society must recognize this expectation as being reasonable. *Id.* at 361 (Justice John Marshall Harlan, concurring).

Katz continues to be instructive as the means of electronic surveillance expand, especially amidst current school-security concerns.²

Students and Personal Privacy

In *Brannum, et al. v. Overton County School Board, et al.*, 516 F.3d 489 (6th Cir. 2008), 34 middle school students alleged the school district violated their constitutional right to privacy by installing video surveillance equipment in the boys' and girls' locker rooms, by viewing and retaining the recorded images, and by failing to ensure sufficient safeguards to prevent the disclosure of these images to third parties. The school board and school defendants moved for summary judgment based on qualified immunity. The federal district court denied the motion, resulting in this appeal to the U.S. Sixth Circuit Court of Appeals. 516 F.3d at 491-92.

The school district was concerned about improving security at the middle school. The school board approved the installation of video surveillance equipment throughout the middle school building. The details were left to the Director of Schools, who delegated to the principal, who then

¹The federal statute at issue in *Katz* has since been amended. While this reduces the effect of the Supreme Court's analysis of the statute in question, it does not affect the general view and application of the Fourth Amendment to surreptitious surveillance that is not properly authorized or justified.

²This article will not discuss cases involving the surreptitious placement of video equipment in locker rooms by teachers and students engaged in voyeurism, of which there is a disturbingly large number.

delegated to the assistant principal. There was no plan established for the number, location, or operation of the video cameras. It was eventually decided that video cameras would be positioned so as to face exterior doors as well as in the hallways leading to the exterior doors. Video cameras were also installed in the boys' and girls' locker rooms. *Id.* at 492.

The images captured by the video cameras were transmitted to the assistant principal's computer terminal. Within three months of the start of the surveillance program, the assistant principal realized the locker room cameras were videotaping students dressing for the athletic activities. He expressed his concerns with the principal, but the video cameras were not removed. The cameras remained in place for the first semester. *Id.*

The assistant principal's computer terminal was not adequately protected from outside access. "Any person with access to the software username, password, and Internet Protocol (IP) address could access the stored images. Neither [the assistant principal] nor anyone else had ever changed the system password or username from its default setting." During the six-month operation of the video cameras, the system was accessed 98 different times. *Id.*

The culminating event occurred when a visiting girls' basketball team used the locker room. Several team members noticed the video camera and alerted their coach. She questioned the principal. The principal assured the basketball coach that the camera was not activated. It was activated, however, and it recorded the girls' basketball team in various stages of undress. The coach reported her concerns to her own principal, who, in turn, contacted the Director of Schools. The Director accessed the security system from his home. Although he displayed a somewhat casual if indifferent attitude about the recorded images, the video cameras were removed the next day. *Id.* at 492-93.

The middle school students brought this action under 42 U.S.C. § 1983,³ claiming the school board and school administrators had violated their constitutional rights while acting under color of state law. In this dispute, there is not a question the school officials were acting under color of state law when they authorized the installation of the surveillance equipment. "However, public officials are entitled to be dismissed on qualified immunity grounds if they can show that they did not violate any of the plaintiffs' federal statutory or constitutional rights that were 'clearly established' at the time of the alleged misconduct and of which the defendants could reasonably be expected to have been aware." *Id.* at 493-94, citing to *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151 (2001). First, there must be a determination the students had a constitutional right that was violated and, if so, was this a constitutional right that was "clearly established" and of which the school officials could be reasonably expected to have been aware. *Id.* at 494.

The students argued that their constitutionally protected right to privacy encompassed the right not to be videotaped while dressing and undressing in the middle school locker rooms, a place designated "for such intimate, personal activity." *Id.* The three-member panel of the 6th Circuit

³An action under 42 U.S.C. § 1983 is to address the "deprivation of any rights, privileges, or immunities" available under the U.S. Constitution or Federal statutes.

concluded “the privacy right involved here is one protected by the Fourth Amendment’s guarantee against unreasonable searches, and that in this case, the defendants violated the students’ rights under the amendment.”⁴ *Id.*

Justification at Inception; Scope of Search

Because the 6th Circuit’s analysis applied Fourth Amendment principles to a public school context, reference was necessary to *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733 (1985) and *Vernonia School District 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386 (1995). This was particularly necessary as “[n]either the Supreme Court nor this court has ever addressed the applicability of video surveillance to the Fourth Amendment’s proscription against unreasonable searches.” *Id.* Applying *T.L.O.* and *Vernonia*, the 6th Circuit panel would need to consider whether the state action (the installation of the camera) was justified at its inception, and, if so, whether the subsequent “search” (the videotaped surveillance) as actually conducted was reasonably related in scope to the circumstances that justified the videotaped surveillance in the first place. *Id.* at 494-95, citing to *T.L.O.*, 469 U.S. at 341.

A student search is justified in its *inception* when there are reasonable grounds for suspecting that the search will garner evidence that a student has violated or is violating the law or the rules of the school, or is in imminent danger of injury on school premises. [*T.L.O.*, 469 U.S. at 342] In this case, the policy of setting up video surveillance equipment throughout the school was instituted for the sake of increasing security, which is an appropriate and common sense purpose and not one subject to our judicial veto. However, the scope and manner in which the video surveillance was conducted is subject to Fourth Amendment limitations, and therefore, appropriate to our inquiry.

A search—and there can be no dispute that videotaping students in a school locker room is a search under the Fourth Amendment—is “permissible in its *scope* when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the *infraction*.” [*T.L.O.*, 469 U.S. at 342] It is a matter of balancing the scope and the manner in which the search is conducted in light of the students’ reasonable expectations of privacy, the nature of the intrusion, and the severity of the school officials’ need in enacting such policies, [citation omitted], including particularly, any history of injurious behavior that could reasonably suggest the need for the challenged intrusion.

Id. at 495-96 (emphasis original). “The Fourth Amendment does not protect all expectations of privacy; only those that society recognizes as reasonable and legitimate.” *Id.* at 496, citing *T.L.O.*,

⁴The 6th Circuit declined to consider application of the Due Process Clause of the Fourteenth Amendment to this privacy invasion action, although it did recognize that other states have applied this clause. *Id.*

469 U.S. at 338. Public students generally (and student-athletes in particular) do not have the same “robust expectation of privacy” while within the public-school context. *Id.*, citing to *Vernonia*, 515 U.S. at 657.

“This does not mean, however, that a student’s expectation of privacy in his or her school locker room is nonexistent. In fact, we have stated before that even in locker rooms, students retain a significant privacy interest in their unclothed bodies.” *Id.* (citation and internal punctuation omitted). Unlike in *Vernonia*, neither the students nor their parents in this dispute were aware of the video surveillance in the locker rooms. “[S]tudents using the [middle school] locker rooms could reasonably expect that no one, especially the school administrators, would videotape them, without their knowledge, in various states of undress while they changed their clothes for an athletic activity.” *Id.*

Given the “inherently intrusive” nature of video surveillance, safeguards are necessary to ensure there is not unauthorized access to the stored images.

In *Vernonia*, procedural safeguards were put into place to protect the students’ privacy, but in this case, the school officials wholly failed to institute any policies designed to protect the privacy of the students and did not even advise the students or their parents that students were being videotaped.... We believe that the scope of the secret surveillance in this case...invaded the students’ reasonable expectations of privacy.

Id. at 496-97. Lastly, the court needed to decide whether the search was excessive in its scope. In both *Vernonia* and *T.L.O.*, the governmental concern was to prevent the trafficking and possession of illegal drugs (*Vernonia*) or contraband (*T.L.O.*) on school property. Although the school district in this case was motivated by a concern to enhance school safety, “a valid purpose does not necessarily validate the means employed to achieve it.” *Id.* at 497.

... One measure of reasonableness is the congruence or incongruence of the policy to be served (student safety), and the means adopted to serve it. Surveillance of school hallways and other areas in which students mingle in the normal course of student life is one thing; camera surveillance of students dressing and undressing in the locker room—a place specifically set aside to offer privacy—is quite another. The two do not stand on equal footing.

Id. at 497-98. It is commonly accepted that a school locker room “is a place of heightened privacy.” As such, “placing cameras in such a way so as to view the children dressing and undressing in a locker room is incongruent to any demonstrated necessity, and wholly disproportionate to the claimed policy goal of assuring increased school security, especially when there is no history of any threat to security in the locker rooms.” *Id.* at 498.

The students had a reasonable expectation of privacy in the locker room. The character of the intrusion was greater than those at issue in *Vernonia* (random, suspicionless urine test) and *T.L.O.*

(emptying contents of purse). “We conclude that the locker room videotaping was a search, unreasonable in its scope, and violated the students’ Fourth Amendment privacy rights.” *Id.*

Qualified Immunity

Notwithstanding the above, “public officials cannot be held liable for violating a person’s constitutional rights unless the right was clearly established at the time of the alleged improper conduct.” *Id.*, citing to *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982).

Some personal liberties are so fundamental to human dignity as to need no specific explication in our Constitution in order to ensure their protection against government invasion. Surreptitiously videotaping the plaintiffs in various states of undress is plainly among them. [Citations omitted.] Stated differently, and more specifically, a person of ordinary common sense, to say nothing of professional school administrators, would know without need for specific instruction from a federal court, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty and that they are grossly offended by their being surreptitiously videotaped while changing their clothes in a school locker room. These notions of personal privacy are “clearly established” in that they inhere in all of us, particularly middle school teenagers, and are inherent in the privacy component of the Fourth Amendment’s proscription against unreasonable searches. But even if that were not self-evident, the cases we have discussed, *supra*, would lead a reasonable school administrator to conclude that the students’ constitutionally protected privacy right not to be surreptitiously videotaped while changing their clothes is judicially clearly established.

Id. at 499. The students had adequately alleged a Fourth Amendment violation of their constitutional right to privacy, a privacy right for which they had a reasonable expectation. The invasion of that right by school officials was not justified by the need to enhance school security. The students’ privacy rights were “clearly established” such that “a reasonable person...would be aware that what he or she was doing violated the Fourth Amendment.” *Id.* at 499-500.

The 6th Circuit determined the school board members and the Director of Schools were entitled to qualified immunity because they were not directly involved in the decision to install the video cameras in the locker rooms nor did they authorize the installation. The principal and assistant principal, however, were not entitled to qualified immunity. “Whether they are shown to have any personal liability to the plaintiffs is a question for determination by the fact finder, not this court.” *Id.* at 500.

Other Cases Involving Student Privacy Issues:

1. *Clinch Co. Board of Education v. Hinson*, 543 S.E.2d 91 (Ga. App. 2000). During a high school girls’ basketball game, a thief broke into the visiting team’s locker room and stole

money and jewelry worth \$2,000. A local sheriff's deputy and school administrators suggested placing a video camera in the locker room in hopes of catching the thief. The camera was supposed to be aimed at the entrance to the locker room. The school media and technology coordinator was asked to set up the video camera, which he did, using his own equipment. Although the camera was aimed at the entrance, it also taped areas where girls were in various stages of undressing while preparing for classes or athletic events. The thief did not reappear. The tapes, however, were never destroyed. About two years later, the tapes were discovered in a storage room. The school board fired the coordinator for incompetence based on his failure to set up the camera so that it would not videotape students, his failure to erase the tapes, his retention of the tapes, and his failure to safeguard unauthorized access to the tapes. Although the coordinator was acting at the behest of a local law enforcement officer (who was also fired) and school administration, the directive was to videotape only the locker room entrance, not areas where students were dressing and undressing. His termination was affirmed.

2. *M.R. v. Lincolnwood Board of Education District*, 843 F.Supp. 1236 (N.D. Ill. 1994) (Nonconsensual videotaping by school officials of special education student's behavior in a common area did not violate IDEA or FERPA. "[V]ideotaping in public areas does not violate any constitutional right of privacy nor constitute an illegal search or seizure." 843 F.Supp. at 1239).
3. *Martin County (FL) School District*, 23 IDELR 841 (OCR 1995) (The school district did not discriminate against the student through the use of the school psychologist's videotaping of the student as a part of the educational evaluation process. This was the usual and customary procedure for educational evaluations of this sort, and the parent was aware of the evaluation procedures.)

School Personnel and Zones of Privacy

Although the U.S. Supreme Court has not directly addressed the extent to which the Fourth Amendment's proscription against unlawful searches and seizures would apply to personnel of a public school district, the highest court has decided that government employees do have some expectation of privacy while engaged in their government employment, but the extent to which this privacy may be enjoyed is assessed on a case-by-case basis.

In *O'Connor, et al. v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492 (1987), a psychiatrist employed by a state hospital was threatened with dismissal based on suspicions of his supervisor that he may have engaged in certain improprieties in the discharge of his duties, which included overseeing the residency program. There had been previous complaints that the psychiatrist had sexually harassed two female hospital employees and had taken inappropriate disciplinary action against a resident. The current concerns arose over the psychiatrist's purchase of a computer for use in the residency program. The psychiatrist was ordered to take paid administrative leave; however, the parties agreed he would take a two-week vacation. During this time, the state hospital intended to conduct an investigation. At the end of the two-week vacation, the investigation had not been

completed. The psychiatrist was ordered off the grounds and onto paid administrative leave. He was eventually fired.

The state hospital, as a part of its investigation, entered the psychiatrist's hospital-provided office and searched it, seizing several items from his desk and file cabinets, including personal items sent to him from a former resident physician. The hospital also seized billing records of a private patient of the psychiatrist. Although the hospital maintained its search was a routine matter to inventory state property when a former employee has been terminated, the search occurred while the psychiatrist was on paid administrative leave. There was never a formal inventory made of the property seized from the psychiatrist's office.

The psychiatrist sued, alleging the search violated his Fourth Amendment rights.⁵ Previous decisions of the Supreme Court acknowledged that there is a reasonable expectation of privacy in one's place of work, although these decisions did not involve government employment. At the outset, the court rejected "the contention...that public employees can never have a reasonable expectation of privacy in their place of work. Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." 480 U.S. at 717. This is not an absolute expectation of privacy, however.

Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.... The employee's expectation of privacy must be assessed in the context of the employment relation. An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees. Instead, in many cases offices are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits. Simply put, it is the nature of government offices that others—such as fellow employees, supervisors, consensual visitors, and the general public—may have frequent access to an individual's office.

Id. In this dispute, the psychiatrist had a reasonable expectation of privacy in his desk and file cabinets. He did not share his desk or file cabinets with other employees. He had occupied the office for 17 years and kept materials in his office that were personal to him (correspondence, patient files, financial records, teaching aids, personal gifts, and mementos). The files on the residency program were maintained outside the psychiatrist's office. *Id.* at 718.

The Supreme Court applied its rationale in *T.L.O.* to this government-employment situation, balancing the invasion of the employee's legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace. *Id.* at 719-20. As in *T.L.O.*, the Supreme Court found that the necessity for probable cause and issuance

⁵The Fourth Amendment protects the "right of people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures...."

of a warrant necessary for a search by law enforcement is impractical in a government employment context, irrespective whether the entering of the office was work-related or investigatory.

The governmental interest justifying work-related intrusions by public employers is the efficient and proper operation of the workplace. Government agencies provide myriad services to the public, and the work of these agencies would suffer if employers were required to have probable cause before they entered an employee's desk for the purpose of finding a file or piece of office correspondence.... Similarly, the concept of probable cause has little meaning for a routine inventory conducted by public employers for the purpose of securing state property. [Citations omitted.] To ensure the efficient and proper operation of the agency, therefore, public employers must be given wide latitude to enter employee offices for work-related noninvestigatory reasons.

Id. at 723. As noted *supra*, a similar rationale would apply where the government employer is investigating work-related misconduct of a government employee. Public employers have an interest in ensuring an effective and efficient delivery of publicly funded services. An investigation of alleged employee misconduct is not a criminal investigation as would be conducted by law enforcement officials. A public employer would need only “reasonable suspicion” to initiate an investigation of this sort.

We hold, therefore, that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable[.]

Id. at 725-26. As noted in *T.L.O.*, a “reasonable suspicion” that misconduct has occurred or is occurring is sufficient to support a determination that a search was “justified at its inception.” However, the search must also be reasonable in its scope. That is, the measures employed must be reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the alleged misconduct. *Id.*, citing to *T.L.O.*, 469 U.S. at 432.

Public school employees would be in the same situation as the psychiatrist in *O'Connor*. Such employees would have some expectation of privacy, but this privacy right would have to be balanced against the public school district's governmental interest in providing effective, efficient services and to address employee misconduct that thwarts this mission.

Teachers: Office Versus Classroom

In *Helisek, et al. v. Dearborn Public Schools, et al.*, 2008 U.S. Dist. LEXIS 25514 (E.D. Mich. 2008), the school district's high school was beset with a series of thefts from the boys' locker

room. The thefts seemed to occur most often during the fifth period, which was Helisek's preparation time. Administration began to suspect that Helisek, a physical education teacher, might be the thief. The principal, assistant principal, and police liaison officer agreed to install a hidden video camera in the staff office used by the physical education teachers. This office is located within the boys' locker room but is separated from the main area by a door. The principal believed the video camera would catch Helisek placing stolen items into the desk in the staff office. 2008 U.S. Dist. LEXIS 25514, at *2-3.

A student who entered the staff office saw the camera in the ceiling. The teachers complained and the camera was removed. However, Helisek and two other teachers sued the school district and the principal, alleging, *inter alia*, violations of the Fourth Amendment (invasion of privacy and unreasonable search). *Id.* at *1, *4-5. The principal sought to be dismissed based on qualified immunity.

The Federal district court denied the principal's motion, finding that she was not entitled to qualified immunity. The principal would be entitled to qualified immunity had her actions not "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at *7-8, *Id.* citing to *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982). However, "[a] government official will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that the action at issue was lawful; but if the officer of reasonable competence could disagree on this issue, immunity should be recognized." *Id.* at *8 (citation and internal punctuation omitted).

The teachers met the first requirement: a violation of a constitutional right. The principal is a public school administrator; as such, she was a state actor. The teachers have also asserted that "they have a reasonable expectation of privacy in their office and an expectation not to be videotaped in their office." *Id.* at *11. There is merit to this contention.

The United States Supreme Court has held that the Fourth Amendment governs the conduct of school officials and that searches and seizures by government employees or supervisors of the private property of their employees are subject to the constraints of the Fourth Amendment. *O'Connor v. Ortega*, 480 U.S. 709, 715-717, 107 S. Ct. 1492 (1987). The Supreme Court has acknowledged that society recognizes that a person enjoys a reasonable expectation of privacy in an office, even in a shared office. *Id.* at 716-717.

Id. at *13. The teachers did provide sufficient evidence that they had an expectation of privacy in their office, which also served as a type of locker room for the teachers and visiting athletic officials.

The locker room/office contains lockers provided by the school so that Plaintiffs could change their clothes. The locker room/office can only be accessed from the boys' locker room and is contained within the boys' locker room. Plaintiffs use the office at least three times a week to change their clothes from street clothes to

athletic clothes and to disrobe in order to shower after conducting physical education classes or working out in the school's fitness room.... The office was for the exclusive use of the male physical education teachers.... Even if the Plaintiffs did not use the office to change their clothes, Plaintiffs still had a reasonable expectation of privacy in the office, as noted by the Supreme Court in *O'Connor*, in light of the fact that the office was a room contained in the boys' locker room and was for the exclusive use of the male physical education teachers.

Id. at *14. Although a search may have been justified at its inception due to the suspected misconduct on Helisek's part, there are questions as to whether the measures employed were reasonably related to the objectives of the search.

There were other teachers who share the office with Plaintiff Helisek who were not suspected in the alleged thefts. Also, the search may have been excessively intrusive since there is testimony submitted that the office was also used by Plaintiffs and referees to change their clothing.

Id. at *15-16. Based on *O'Connor*, the teachers had a "clearly established right to be free from unreasonable searches by their employer and supervisor." *Id.* at * 16-17.

Although neither the Sixth Circuit nor the Supreme Court have [sic] specifically addressed the role of video surveillance in a school office or locker room context, the Court notes that *O'Connor* clearly established that a public employee does have a constitutional right to be free from unreasonable searches by their public employer. "Video" surveillance is merely a method used in the search.

Id. at *17. The Federal district court also found persuasive *Brannum v. Overton Co. Sch. Bd.*, discussed *supra*, particularly with regard to the use of surreptitious videotaping as a government invasion of "inherent personal dignity" where personal privacy (*i.e.*, disrobing) is implicated. Such a constitutional right not to be videotaped while changing clothes is "clearly established." *Id.* at *17-19.

The Federal district court judge also declined to accept the principal's argument that the teachers failed to establish a *prima facie* case of invasion of their privacy. In order for the teachers to establish such a claim, they would have to demonstrate (1) an intrusion; (2) into a matter in which the teachers had a right of privacy; and (3) by means that would be objectionable to a reasonable person. *Id.* at *28-29.

Plaintiffs have stated a *prima facie* case for the reasons set forth above in the Fourth Amendment claim analysis. [The principal] intruded by placing two video cameras in Plaintiffs' office in which Plaintiffs had a right of privacy and reasonable persons would object to such video surveillance, in light of the testimony that Plaintiffs and referees changed in and out of their clothing in this space. [The principal] is not entitled to governmental immunity on Plaintiffs' invasion of privacy claim.

Id. at *29.

Crist, et al. v. Alpine Union School District, 2005 Cal. App. Unpub. LEXIS 8699 (Cal. App. 2005) also involved the video surveillance of the office shared by two school personnel (a technology resource specialist and a computer aide) in an elementary school building. One teacher reported that someone was using her computer after hours. Without notifying the complaining teacher or Crist, who shared the office with her, the school district installed a hidden camera to videotape the computer area during after-school hours. The resulting videotapes do not indicate that either teacher was inappropriately accessing the computer after hours. When the two teachers learned of the video surveillance, they sued, alleging invasion of privacy. The California Court of Appeals determined there was no privacy violation because the intrusion was limited and there was a strong justification for the intrusion in the first place.

The office shared by the two women contained a number of personal items. The room was generally locked. The two women and the custodial staff were the only ones with access to the office. The technology resource specialist noticed that someone had used the office computer the night before. She suspected the night custodian, who had previously installed software on her computer against her wishes. The technology specialist reported her concerns to an administrator. It was later decided to install the hidden video camera to identify the culprit and develop evidence for a disciplinary hearing. The surveillance occurred only after school hours. The surveillance was by video only (no audio), and lasted from May 17 to June 11. The two women were not advised of the video surveillance. They later discovered the video equipment.

The technology resource specialist was particularly upset because she used the office for personal matters as well as official functions, such as changing her clothes and engaging in other personal hygiene matters. The school district assured her none of these activities were recorded because the surveillance occurred only after school hours. The computer aide also stated she used the office to change clothes. The computer aide does not appear in any of the videotapes.

The trial court granted summary judgment to the school district. Although the two women had presented facts demonstrating a reasonable expectation of privacy, the school district's surveillance was reasonable under the circumstances and furthered the school district's countervailing goals. The appellate court agreed, relying upon *O'Connor*.

We agree with the trial court that under the circumstances of this case [the two women] could legitimately assert a reasonable expectation of privacy in the computer office. The courts have recognized that a right to privacy may exist at a workplace. [Citations omitted.] An employee's personal office is an area where an employee typically expects to have some level of privacy even from his or her own employer. [Citations omitted.] Employees can reasonably expect that an office provided for their use, to which they may retreat and close the door while performing their work duties, would not normally be subject to secret video surveillance by their employer.

Id. at *24-25. However, the intrusion was “not highly offensive.” The school district also had sufficient justification for its intrusion. The justification outweighed the privacy claims of the women. *Id.* at *25.

[The] District had a strong, legitimate reason for engaging in the surveillance. Unauthorized use of the computer system is a serious matter, and District was entitled to take steps to stop the activity. The need for District action was particularly acute given that the night custodian had already ignored [the technology specialist’s] direction that he not use the computer. District had a right to engage in the videotaping to obtain incontrovertible proof of the identity of the culprit and to support a disciplinary action against the employee.

Id. at *27. The school district “narrowly tailored its surveillance to time, location, and scope, and engaged in the conduct for a legitimate purpose.” *Id.* at *28. The two women were not videotaped during their scheduled work day. The surveillance would only affect them had they chosen to work extended hours. During 26 recorded dates, the aide does not appear at all, while the technology specialist appears only two times. This indicates “the limited nature of the intrusion.” *Id.*

The California Court of Appeals added that “[w]e emphasize that our conclusion is limited to the particular circumstances of this case, and should not be construed to broadly countenance video surveillance in the workplace without careful restrictions and strong justification.” *Id.* at *34.⁶

Helisek and *Crist* involved office areas. The classroom itself is a different matter.

In *Plock, et al. v. Board of Education of Freeport School District No. 145*, 545 F.Supp.2d 755 (N.D. Ill. 2007), the school district installed audio/visual recording equipment in two classrooms for students with disabilities who have significant needs. The school district had received allegations of abuse in these classrooms. The decision to install the equipment stemmed in part from the inability of the students in the class to independently report any abuse given the severity of their disabilities.

The special education teachers assigned to the classrooms filed suit to challenge the audio recording of the classrooms, not the video recording.⁷ The teachers claimed the audio recording of the classrooms would, *inter alia*, violate the Fourth Amendment as an unreasonable search. The teachers sought to enjoin the school district from engaging in audio recording.

⁶Incidentally, the school district did capture on video the night custodian using the computer.

⁷There is concern that the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2521, may prohibit surreptitious audio recordings by public school districts. Plaintiffs did not raise the federal law in this dispute, relying instead upon an analogous State law. There is no known case where this Federal law has been applied directly to a public school dispute. It is implicated in *Wisconsin v. Duchow*, *infra*.

The Federal district court noted the U.S. Supreme Court holding in *O'Connor v. Ortega* recognized that public employees do have certain expectations of privacy in their offices, but this expectation can be reduced by actual office practices and procedures as well as by legitimate regulation by the employer. A reasonable expectation of privacy, given the variety of work environments, requires a case-by-case analysis. *Id.* at 757.

In making this case-by-case determination, it becomes critically important whether the area to be searched was given over to the employee's exclusive use or whether the area was shared by others. If the area searched has been given over to an employee's exclusive use, the court is likely to uphold that employee's expectation of privacy as objectively reasonable.

Id. But this dispute does not involve an office or an area of exclusive use.

In this case, the court recognizes that the typical classroom may also contain a teacher's personal office space. Portions of that office space such as a teacher's desk and locked file cabinets could conceivably be reserved for the teacher's exclusive use, giving rise to an expectation of privacy, which society is willing to recognize as reasonable. *See, e.g., O'Connor*, 480 U.S. at 718.... However, an entire classroom in a public school building is not reserved for the teacher's exclusive, private use. Rather, classrooms are open to students, other faculty, administrators, substitute teachers, custodians, and on occasion, parents.

Id. at 757-78. "What is said and done in a public classroom is not merely liable to being overheard and repeated, but is likely to be overheard and repeated." *Id.* at 758.

A classroom in a public school is not the private property of any teacher. A classroom is a public space in which government employees communicate with members of the public. There is nothing private about communications which take place in such a setting. Any expectations of privacy concerning communications taking place in special education classrooms such as those subject to the proposed audio monitoring in this case are inherently unreasonable and beyond the protection of the Fourth Amendment.

Id. Because the teachers did not have a reasonable expectation of privacy in their classrooms, the court granted judgment in the school district's favor on the teachers' Fourth Amendment claim. *Id.*

State of New Hampshire v. McLellan, 744 A.2d 611 (N.H. 1999) did involve a classroom but not a teacher. An elementary school principal received several reports of thefts in the school. He contacted local law enforcement and indicated he suspected McLellan, the head custodian. Law enforcement installed a video surveillance camera in the classroom where the majority of thefts had occurred. The video-only surveillance was set to record from 4:00 a.m. to 7:30 a.m., which was when the teacher arrived. Law enforcement also put an envelope containing \$26.91 in the teacher's desk drawer.

The head custodian was observed on videotape taking money from the envelope. Eventually, the head custodian was charged with theft. He sought to suppress the evidence obtained through the video surveillance, asserting in part that the surveillance was “an unconstitutional warrantless search in violation of...the Fourth and Fourteenth Amendments to the United States Constitution.” *Id.* at 613.

The New Hampshire Supreme Court observed “[t]he employee’s expectation of privacy must be assessed in the context of the employment relation.” *Id.* at 614, citing *O’Connor v. Ortega*, 480 U.S. 709, 717, 107 S. Ct. 1492 (1987).

The classroom in this case was not an area over which the defendant enjoyed exclusive use and control. His job required him to enter it only to supervise the work of another custodian. Furthermore, the classroom was an area that was open to students and school staff. See *O’Connor*, 480 U.S. at 717-18. The defendant emphasizes that he was the only person who had access to the classroom during the time the video camera was set to record. This, however, does not alter the fact that the classroom was not his personal space. [Citation omitted.] Accordingly, we conclude the defendant did not have a reasonable expectation of privacy in the classroom.

Id. Because McLellan had no reasonable expectation of privacy in the classroom, the evidence obtained through the video surveillance would not be suppressed.

Access Rights

One of the issues in the *Crist* case, *supra*, was the right of the teacher to access the videotapes of her office space. The issue was resolved short of court and was not otherwise addressed. However, this issue was the primary one in *Medley v. Board of Education of Shelby County et al.*, 168 S.W. 3d 398 (Kentucky App. 2004).

Medley was a tenured special education teacher. Following complaints from some of her students that she treated them inappropriately, video cameras were installed in her classroom to monitor her performance.

Medley made an “open records” request to the principal for access to the videotapes because she believed the videotapes would prove to be a valuable resource “to use to evaluate [her] performance as a teacher, as well as the management of [her] classroom.” 168 S.W.2d at 401. The principal forwarded the request to the superintendent, who denied Medley access to the videotapes because they were “education records” under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (and the Kentucky version of FERPA known as “KFERPA”) and were therefore exempt from disclosure.

Medley asked the Kentucky Attorney General (AG) to review the denial, but the AG affirmed the school’s decision, adding that her status as a teacher did not alter the FERPA analysis because the right to access “turns not upon the identity of the requesting party or her stated interest in the records, but rather on the nature of the records at issue.” The circuit court agreed with the AG and

affirmed the denial of access, declining to consider whether her status as a teacher would permit her access. *Id.* at 401-02.

The Kentucky Court of Appeals viewed the matter differently, although it too assumed (as did Medley, the principal, the superintendent, the AG, and the circuit court) that the videotapes were, in fact, “education records.” The appellate court was more inclined towards Medley’s argument that, as a teacher, she is within an exception that permits teachers access to inspect education records. The court noted that FERPA, under some conditions, does provide access to certain third parties without first obtaining written consent of a parent/guardian or eligible student. One of these exceptions includes providing access to “school officials, including teachers within the educational institution...who have been determined by such agency or institution to have legitimate educational interests...” 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1). *Id.* at 403.

The appellate court also noted the definition of an “education record” refers to records that are “(1) Directly related to a student; and (2) Maintained by an educational agency or institution.” 20 U.S.C. 1232g(a)(4)(A); 34 C.F.R. § 99.3.⁸ *Id.* The court found the AG and the circuit court failed to assess whether Medley, as a teacher, had a “legitimate educational interest” in the requested records. She could not be treated merely as a “member of the public” because of her teacher status. Previous case law and an earlier AG opinion upon which the AG and the circuit court relied could be easily distinguished. (The previous AG opinion involved a parental request for access to a videotape on a school bus that the parent wanted to use to demonstrate the bullying her child was experiencing. The videotape included the identities of other children, which, under FERPA, a parent is not entitled to. The Kentucky Court of Appeals found that the only commonality between this situation and Medley’s is that there is videotape involved.) *Id.* at 403-04.

The court agreed “the videotapes in question are, in fact, ‘education records,’[but] we do not believe Medley’s request should be considered as made by a ‘member of the public.’” *Id.* at 404. Her position as a teacher must be considered. *Id.* She “is a teacher who was present in the classroom when the videotapes were recorded. She was aware of the installation and use of the videotapes to monitor her performance. Since Medley was present when the videotapes were made, there is no confidentiality issue. Medley would obviously have knowledge of the students in her classroom.” *Id.* at 404-05.

The only way Medley could be denied access to the videotapes “would be a determination that her purpose for requesting the videotapes was not ‘a legitimate educational interest.’” *Id.* at 405. However, this critical element has not been addressed much less legally determined. Accordingly, the Court of Appeals reversed the circuit court and remanded the matter so that a determination can be made as to whether Medley, as a teacher, has a “legitimate educational interest” in access to the videotapes.

⁸The term “education records” as defined under § 99.3 does not include “[r]ecords of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8,” under which many videotape access disputes arise (on the bus, in the corridors, in common areas). See *infra*.

Who Defines The Terms?

The FERPA language itself is subject to some local interpretation. “School official” is not defined. Neither is “legitimate educational interest.” The Family Policy Compliance Office (FPCO)⁹ has noted this in several letters it has released. The most recent one—September 7, 2004—is entitled “Letter to Parent re: Disclosure of Education Records to Outside Legal Counsel,” an issue FPCO has addressed previously.¹⁰ In its recent Letter, FPCO wrote:

There are a number of exceptions to FERPA’s prohibition on nonconsensual disclosure of education records. One exception permits institutions to disclose education records without consent to parties such as outside legal counsel, psychologists, or collection agents because they are providing the types of services that would allow them to obtain access to education records without consent as if they were in fact “other school officials” under FERPA 34 CFR § 99.31(a)(1). In other words, these parties have a “legitimate educational interest” in the information or records. This would be the case whether or not the school has specifically identified a particular contractor or type of contractor in its criteria for determining who are school officials. That is, given the construction of the definition of “education records,” we believe that FERPA was not intended to prevent schools from seeking outside assistance in performing certain tasks that it would otherwise have to provide for itself. So long as the task does not exceed the school’s criteria for determining what is a legitimate educational interest, the disclosures of education records to an agent under contract with the school to provide certain services would not be outside the scope of FERPA.

Also see *Letter to Bartlett*, 36 IDELR 186 (FPCO 2001) (school district employed private center to collect and analyze data).

Whether or not the videotapes in *Medley* are “education records” is academic at this point. All the actors in the play have agreed that they are. There are times when videotapes would become a part of a student’s education record, of course, but this would typically be where the videotape was directed at some function of the student (*e.g.*, used to evaluate the efficacy of a goal in a student’s Individualized Education Program; used to document, analyze, and address untoward behavior of a student; used as a means of recording an IEP Team meeting).

⁹The FPCO is the Federal agency charged with the responsibility for enforcement of FERPA. See 20 U.S.C. §§ 1232g(f), (g) and 34 C.F.R. §§ 99.60-99.67.

¹⁰The letter can be viewed and downloaded at FPCO’s On-Line Library through www.ed.gov/policy/gen/guid/fpc/ferpa/library/parent20040907.html (last visited July 8, 2008). For a previous FPCO letter addressing the same issue, see *South Glens Falls (NY) Central School District*, 32 IDELR ¶ 100 (FPCO 1999) (school district’s disclosure of information from a special education student’s education record to its attorney did not violate FERPA because FERPA permits such disclosures to school officials and to individuals performing services for the school district).

Other Videotape Cases Affecting Teachers

1. *Roberts v. Houston Independent School District*, 788 S.W.2d 107 (Tex. App. 1990) (Teacher's dismissal for inefficiency and incompetency was affirmed. Teacher objected to use of videotaping by school district's evaluation team, but videotaping is part of the school district's teacher evaluation procedures. She asked for copies of tapes, but the school district refused to provide her with copies although it did make them available to her for review and inspection. The school district used a composite of the videotapes at her dismissal hearing. She could have used the unedited videotapes in the presentation of her case or in cross-examining adverse witnesses, but she chose not to do so. The court noted that the school never attempted to videotape the teacher's private affairs but confined the videotaping to her classroom. The teacher did not have a reasonable expectation of privacy in her classroom such that videotaping violated any privacy right she may have had. Also, videotaping without teacher's request or permission did not violate the school district's own policy.)
2. *M.R. v. Lincolnwood Board of Education District*, 843 F.Supp. 1236 (N.D. Ill. 1994) (Nonconsensual videotaping by school officials of special education student's behavior in a common area did not violate IDEA or FERPA. "[V]ideotaping in public areas does not violate any constitutional right of privacy nor constitute an illegal search or seizure." 843 F.Supp. at 1239).
3. *Martin County (FL) School District*, 23 IDELR 841 (OCR 1995) (The school district did not discriminate against the student through the use of the school psychologist's videotaping of the student as a part of the educational evaluation process. This was the usual and customary procedure for educational evaluations of this sort, and the parent was aware of the evaluation procedures.)

School Buses, School Bus Drivers, and Privacy Interests

The locker rooms, offices, and classrooms of public school districts are not the only places where video cameras are located. School buses generate considerable controversy.

Wisconsin v. Brian Duchow, 749 N.W.2d 913 (Wisc. 2008) did not involve videotaping by school officials, but it did involve audiotaping by the parents of a student who was believed to be a victim of abuse by the school bus driver.¹¹

In *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967), the Supreme Court found that the attaching of a recording device to the outside of a telephone booth constituted a "search" for Fourth Amendment purposes. Following *Katz*, Congress passed Title III, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, with the purpose "to protect privacy of wire and oral communications and to delineate on a uniform basis the circumstances and

¹¹This case was decided June 10, 2008. At this writing, official pagination does not exist. The Wisconsin Supreme Court's decision is being reported from the court's slip opinion.

conditions under which interception of wire and oral communications may be authorized.” *Gelbard v. U.S.*, 408 U.S. 41, 48, 92 S.Ct. 2357 (1972).

State legislatures followed suit, passing their own versions of the Omnibus Crime Control and Safe Streets Act. Wisconsin has its version, known as the Electronic Surveillance Control Law.¹² Although such laws are intended to protect citizens from unauthorized interception of their private communications, Federal and State laws have recognized exceptions. Brian Duchow’s “speech” will be an exception.

Jacob M. was a nine-year-old elementary school student with Down Syndrome and Attention Deficit Disorder. He also had a severe communication disorder. Brian Duchow was his school bus driver. Jacob was the first student to board the school bus each morning. Jacob’s parents began to notice changes in Jacob’s behavior. Duchow reported that Jacob spat at him. Jacob also began to punch his toys, “kick at” the family dog, and resisted boarding the bus in the morning. His teacher reported that Jacob would cry at school when it was time to board the bus to go home. These behaviors had not been previously exhibited.

Jacob’s parents suspected something was amiss on the school bus. They placed a voice-activated recorder in Jacob’s backpack before he boarded the bus. That evening, they listened to the tape recording. They heard Duchow apparently slap Jacob. They also heard Duchow make the following statements:

- “Stop before I beat the living hell out of you.”
- “You’d better get your damn legs in now.”
- “Do I have to tape your mouth shut because you know I will.”
- “Do you want another one of these?”
- “I’m gonna slap the hell out of you.”
- “Do you want me to come back there and smack you?”

The parents shared the tape recording with a Milwaukee Police Officer, who then investigated the matter. Duchow admitted he had threatened Jacob and that he had slapped Jacob twice in the face with his open hand. He eventually pled guilty to physical abuse of a child but not before he moved to suppress the contents of the tape recording, claiming that the recording violated Wisconsin’s Electronic Surveillance Control Law. The trial court eventually denied his motion, finding that Duchow’s statements were not an “oral communication” within the meaning of the law. The Wisconsin Court of Appeals reversed. Although the appellate court found the statements had been lawfully intercepted, the statements could not be admitted at trial because the statements were not obtained “under color of law” as Wisconsin law requires.

The State appealed to the Wisconsin Supreme Court. The Supreme Court noted that the issue is whether Duchow’s tape-recorded statements were “oral communication” as defined by the Electronic Surveillance Control Law. The court eventually determined that the statements were not “oral communication” because Duchow had no reasonable expectation of privacy in the

¹²*Wis. Stat.* §§ 968.27-.33.

statements he made. Because his statements did not fall within the Electronic Surveillance Control Law, this law provided no basis for suppression of the tape recording.

Statutory Construction: “Oral Communication”

Wisconsin’s Electronic Surveillance Control Law defines “oral communication” as follows:

“Oral communication” means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation. “Oral communication” does not include any electronic communication.”

Duchow argued this definition meant that an “oral communication” was one “uttered under circumstances in which the speaker has a reasonable expectation that the statement will not be intercepted.” The State asserted the definition included statements “uttered under circumstances in which the speaker has a reasonable expectation of privacy.” The Supreme Court allowed that both of these definitions were reasonable constructions. An ambiguity arisen that could only be resolved through resort to the usual standards for statutory construction, including consultation with “extrinsic sources” such as the legislative history and federal constructions of the analogous Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The definition of “oral communication” in Title III is nearly identical to Wisconsin’s definition. Of the Circuit Courts of Appeal that have addressed the federal definition of “oral communication,” the 5th, 7th, 8th, 10th, and 11th Circuits have found that the test is a “reasonable expectation of privacy” one as asserted by the State. Only the 6th Circuit has adopted Duchow’s “reasonable expectation of non-interception” test.

“Accordingly, we follow the overwhelming abundance of federal case law that interprets ‘oral communication’ to incorporate a reasonable expectation of privacy, as we conclude that, in enacting [the State law], the legislature did incorporate a reasonable expectation of privacy into the meaning of ‘oral communication.’”

“Reasonable Expectation of Privacy”

One has a “reasonable expectation of privacy” when he or she has both (1) an actual subjective expectation of privacy in the speech, and (2) a subjective expectation that is one that society is willing to recognize as reasonable. The parties agree in this matter that Duchow did have a “subjective expectation of privacy in his speech to Jacob,” so the Court focused on whether this expectation of privacy is one society would recognize as reasonable.

There is no single factor for determining whether one has a “reasonable expectation of privacy.” Any analysis would require “an examination of the totality of the circumstances.” Case law has developed some non-exclusive factors that have been applied to discern whether an individual’s expectation of privacy is objectively reasonable:

- the volume of the statements;
- the proximity of other individuals to the speaker, or the potential for others to overhear the speaker;

- the potential for the communications to be reported (an “assumption of the risk” factor);
- the actions taken by the speaker to ensure his or her privacy;
- the need to employ technological enhancements for one to hear the speaker’s statements;
- the place or location where the statement was made.

Duchow argued that there were five factors that support his contention that he had an objectively reasonable expectation of privacy: (1) a student is not expected to be carrying a tape recorder in his backpack while riding the school bus; (2) Duchow and Jacob were the only ones on the bus; (3) Duchow’s statements were made in an enclosed vehicle and not in a public place; (4) Duchow claims the volume he delivered his statements was “sufficiently low” such that a third party could not overhear them; and (5) an application of the State’s argument would make fair game all intercepted communications that occurred during the commission of a crime.

The Wisconsin Supreme Court rejected each argument. Duchow was an employee of a public school district, hired to operate a public school bus. As an employee of a public entity, his expectation of privacy will be diminished particularly in places shared with others and not designed for his exclusive use. Duchow did not have a reasonable expectation of privacy on the school bus. The bus was not Duchow’s personal space nor his personal property; the bus was being used for a public purpose; Jacob was a public school student who was to be transported on the bus; and the bus windows made visible both Jacob and Duchow. The statements did not occur in a situation where Duchow could have an objectively reasonable expectation of privacy.

In addition, Duchow’s statements were actually threats to injure Jacob. “A person’s reasonable expectation of privacy is compromised when he or she knowingly exposes statements to others, rather than keeping them to himself or herself. [Citation omitted.] Moreover, a subjective expectation of privacy is not reasonable when the words spoken are ones the hearer is likely to report, such as threats to injure the person to whom the statement was made.”

Duchow could not argue that, due to Jacob’s disabilities, there was no potential for his statements to be reported. The Supreme Court found that Jacob did communicate Duchow’s threatening statements by acting aggressively and angrily at home and crying at school when he was required to board the bus. By threatening and harming Jacob, Duchow “assumed the risk that his threatening statements would be revealed to others.” Furthermore, Duchow’s statements are not the kind that society generally would recognize as meriting a reasonable expectation of privacy.

Our review of the totality of the circumstances presented here leads us to conclude that Duchow had no reasonable expectation in the privacy of his threats and abuse of Jacob on the school bus. The school bus was public property, being operated for a public purpose. The statements Duchow seeks to protect were threats directed at a child while the child was being transported to school. Because Duchow threatened Jacob, Duchow engaged in speech that was likely to be reported. Duchow assumed the risk of disclosure. Accordingly, we conclude that Duchow’s abusive speech had no reasonable expectation of privacy attendant to it. Therefore, his threats to Jacob are not “oral communication” within the meaning of [State law].

It makes no difference that Duchow and Jacob were the only ones on the bus. The statements were made in a “public place” (the school bus). There is no reasonable expectation of privacy in the passenger area of the school bus. “Moreover, the presence of a recording device on a bus is a minor intrusion on a driver, because society retains a significant interest in ensuring the safety of those traveling on public school buses.”

Duchow’s statements were not protected by the Electronic Surveillance Control Law. As a consequence, there was no legal basis for suppressing the tape-recording as evidence.

Goodwin v. Moyer, 549 F.Supp. 2d 621 (M.D. Pa. 2006) is a more standard application of relative privacy rights in a public school employment context. Goodwin, a school bus driver, filed suit against the school district, alleging, *inter alia*, that the installation of video surveillance equipment in the school bus he operated violated his privacy rights under the Fourth Amendment. Goodwin was not directly employed by the school district. Rather, he was employed by a company that had a contract to provide transportation for the public school district. There were indications the school district was not satisfied with Goodwin’s discharge of his school-bus driver responsibilities.

The video camera was installed in the school bus he was assigned to by both his employer and the school district. The videotape indicated several errors committed on the part of Goodwin, including discharging students at the wrong stops and in dangerous traffic situations. The school district eventually declined to retain his services on a full-time basis and was less-than-enthusiastic in permitting him to operate a school bus as a substitute. Eventually, Goodwin sued both his employer and the school district. The defendants moved to dismiss the complaint.

The Federal district court dismissed Goodwin’s invasion of privacy claim under the Fourth Amendment based on the installation of the video surveillance equipment.

As a school bus driver, Plaintiff enjoyed a diminished expectation of privacy. Plaintiff drove children, for whom society has a special interest to protect from any misdeeds by the bus driver and from whose misdeeds society likewise has a special interest to protect the bus driver. In addition, we find an onboard video camera to be an insignificant intrusion upon Plaintiff’s privacy. Plaintiff was not located in a private area; he was in a public conveyance surrounded by others and in view of the public through the bus’s windows. Moreover, the video camera captures the entire activity of the bus as it shuttles children to and from school, it does not capture Plaintiff engaged in acts of a private nature. Finally, the government has a compelling interest in protecting children entrusted to it, as well as in protecting the bus driver from the children. Accordingly, Plaintiff has not suffered an unreasonable deprivation of his Fourth Amendment right to privacy.

549 F.Supp. 2d at 633. The court eventually granted the school district’s Motion for Summary Judgment. See *Goodwin v. Moyer*, 2007 U.S. Dist. LEXIS 13614 (M.D. Pa. 2007).

Access Rights to School Bus Videotapes

Lindeman, et al. v. Kelso School District No. 458, 111 P.3d 1235 (Wash. App. 2005) and *Lindeman v. Kelso Sch. Dist.*, 172 P.3d 329 (Wash. 2007).

Grainy footage from school buses have been seen on nationally broadcast television news shows: students fighting with each other on the school bus; students fighting with the bus driver or bus aide; or students generally acting out, often in the midst of chaos.

A question that arises is how did the media outlets get the videotape in the first place. What is the legal status of a school bus surveillance videotape (“education record” or “law enforcement record”) and how was it released to the media?

Although it appears that a typical bus surveillance videotape would be a “law enforcement record” under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g(a)(4)(B)(ii), 34 C.F.R. § 99.8, and as such is not subject to the access and disclosure requirements of FERPA, a “law enforcement unit” record can lose its designation when it is used for educational planning, which, arguably, would include disciplinary matters.¹³

While there are few cases that directly address this point, there is a growing number of cases involving videotapes, their use within the public school context, and the relative access rights of parents or third parties. *Lindeman et al. v. Kelso School District No. 458* is one such case.¹⁴

This dispute arose from an altercation between Mr. and Mrs. Lindeman’s child and another child on the school bus. The surveillance tape on the bus captured the altercation, apparently showing the other student as the aggressor. Although the standard operating procedure for the school district is to reuse the surveillance tapes, this one was set aside for use in subsequent disciplinary proceedings. The parents were permitted to view the videotape. They later requested a copy of the videotape, but the school district declined the request, citing to Washington’s Public Disclosure Act (PDA) and FERPA. 111 P.3d at 1237.

The parents also sought the videotape in redacted form if necessary. The school argued that the videotape, because of its format, could not be redacted, and that, in essence, the parents were

¹³A “record” under FERPA “means any information recorded in any way, including, but not limited to, ...video or audio tapes....” 34 C.F.R. § 99.3. The federal regulations and guidance for the Individuals with Disabilities Education Act specifically address videotaping at IEP meetings, noting that such records are not required but “[a]ny recording of an IEP meeting that is maintained by the public agency is an ‘education record’ within the meaning of the Family Educational Rights and Privacy Act..., and would, therefore, be subject to the confidentiality requirements of the regulations under both FERPA (34 CFR Part 99) and Part B [of the IDEA] (§§ 300.560-300.575).” 34 C.F.R. Part 300, Appendix A, Letter # 21.

¹⁴The facts are taken from the Washington appellate court decision in *Lindeman v. Kelso School Dist. No. 458*, 111 P.3d 1235 (Wash. App. 2005).

requesting the school “to create a new record,” which is not required by the PDA. When again the school refused to release the videotape in any format, the parents initiated suit under the PDA.¹⁵ They also served a subpoena upon the school, seeking to obtain the videotape through this route. The school again refused and sought to have the subpoena quashed. Eventually, the parties appeared before the trial court in a “show cause” hearing. The trial court agreed with the school that the videotape contained personally identifiable information regarding another public school student and thus was not subject to disclosure under the PDA. The court also found the school district was not required to edit the videotape. The court declined to address any FERPA applications. *Id.* at 1237-38.

The parents appealed, but the Washington Court of Appeals agreed with the trial court. Even though the PDA—as is true of all States’ laws regarding access to public records—is intended to be construed liberally and in favor of access, the PDA exempts from disclosure “information related to persons in public schools” because “much of the personal information gathered in administering these programs relates to a specific individual’s typically confidential needs or evaluation rather than to the general administration of government by those acting on behalf of our government.” *Id.* at 1240 (emphasis omitted).

The parties then launched into an elaborate “battle of the dictionaries” over what is meant in statute by “personal information,” with the parents, employing a dictionary published in 1950, arguing for a rather strict interpretation that would make the videotape “public” because the altercation on the school bus was observed by others. The school argued the content of the videotape remained “personal” because the information involved a specific individual and recorded “potentially offensive private matters” (potential assault of another student on a public school bus). The appellate court—using a 1969 edition of the dictionary—agreed with the school district. “[T]he videotape clearly contains ‘personal information’ because it would show the identities of the students on the bus. Thus, to the extent the tape identifies the children on the bus and indicates that they are district students, it falls under [PDA exemption for records of public school children]. We hold, therefore, that the trial court did not err when it concluded that the tape was exempt from PDA disclosure.” *Id.* at 1241-42.

The Court of Appeals also rejected the parents’ argument that redaction of the videotape was feasible, could have occurred at a reasonable cost, and that the trial court erred by not considering this option.

We agree with the District that even if it were possible to redact the tape, such redaction would obliterate audio and visual personal information such as students’ faces, bodies, voices, clothing, and so forth, which would otherwise tend to reveal protected student identities. After such redaction, there would be no meaningful information remaining on the tape.

¹⁵This created something of a disadvantage for the Lindemans because their PDA request would be as a member of the public at large and not as a “parent.” The school had granted them access as a “parent” under FERPA when it let them view the videotape.

Id. at 1243. The court reiterated:

- (1) the District's usual practice is to record over and re-use school bus surveillance videotapes every week;
- (2) the District retained this particular tape solely for disciplinary purposes relating to this particular incident;
- (3) such videotapes are not part of the District's generally kept records concerning administration of the school district;
- (4) nonetheless, the District has already allowed the Lindemans to view the tape and has not kept it secret from them;
- (5) the Lindemans are seeking the tape only under the PDA allowing disclosure of certain public records and not in connection with any tort action related to the school bus incident; and
- (6) aside from certain regularly kept school data collections, the law prohibits the School District from disclosing to the general public private, personal information about their individual students.

Id. The trial court's judgment was affirmed, but not for long.

The Washington Supreme Court reversed the Court of Appeals. In *Lindeman v. Kelso Sch. Dist.* No. 458, 172 P.3d 329 (Wash. 2007), the Washington Supreme Court noted the parties did not dispute the videotape at issue was a "public record" under State law. The school district had refused to disclose the tape based on the statutory exemption for "[p]ersonal information in any files maintained in public schools [.]" 172 P.3d at 331.

Because State law does not define "personal information," the court resorted to the dictionary to discern the "plain and ordinary" meaning. *Id.* The court narrowly construed "personal information" within the public school context to mean information that is both "personal" and "maintained for students." *Id.* The State law exemption would include information in a "Student's personal file, such as a Student's grades, standardized test results, assessment, psychological or physical evaluations, class schedule, address, telephone number, social security number, and other similar records." *Id.*

The surveillance camera served as a means of maintaining security and safety on the school bus. "Merely placing the videotape in a location designated as a student's file does not transform the videotape into a record maintained for students." *Id.* The videotape is a surveillance tape, not a student record.

Even if the District ultimately used the videotape as the basis for disciplining the student who committed the assault, the videotape itself would not thereby be converted into personal information in files maintained for students, since the videotape does not reveal whether discipline was or was not imposed. The District cannot change the inherent

character of the record by simply placing the videotape in the student's file or by using the videotape as an evidentiary basis for disciplining the student.

Id. at 332.¹⁶

The school district in *Lindeman, supra*, cited in its brief *WFTV, Inc. v. School Board of Seminole County*, 874 So.2d 48, *rev. den.* 892 So.2d 1015 (Fla. 2004). See *Lindeman*, 111 P.3d at 1243, *n.* 7. The Florida Public Records Act, similar to other States' laws, has the lofty purpose of granting to the public the greatest amount of access to government records. By necessity, some records are declared confidential (such as medical or mental health records and trademark information), while other records are exempt from disclosure at the discretion of the governmental agency (such as questions or prompts to be used in standardized assessments). This case presents an interesting clash over access to "education records" that are covered by both the Florida Public Records Act and the Family Educational Rights and Privacy Act (FERPA), 20 USC § 1232g, as implemented through 34 CFR Part 99.

This dispute began when WFTV sought access to redacted Transportation Student Discipline Forms (incident reports) and surveillance videotapes from the school district's school buses. The videotapes show views of students riding on the school buses, including "identifiable facial features." The surveillance videotapes are not maintained permanently but reused. However, "[w]hen a segment of Surveillance Videotape is relevant to a student disciplinary question, the tape or portion thereof is filed and retained by the Board as an Education Record." 874 So.2d at 49-50.

The school board, under Florida law, believed that the information sought, even in redacted form, would be confidential. WFTV acknowledged it was not entitled to access to information that would be personally identifiable information, but argued "that the School Board is required to redact the personally identifiable information from the Surveillance Videotape and Transportation Student Discipline Forms...and provide public access to the redacted documents." *Id.* at 52. A declaratory action was filed, but the trial court found in the school board's favor. WFTV appealed.

On appeal, WFTV continued its argument that the confidentiality/exemption provisions of Florida law do not apply. The school board asserted the provisions prohibit WFTV "from having any access to the Surveillance Videotape and Transportation Student Discipline Form even if all personally identifying information is redacted from the documents. Even with such redaction, the School Board argues that the Requested Records are still confidential...and may not be disclosed,

¹⁶This finding is of doubtful legal adequacy. The dissenting judges believe the matter should be remanded to the trial court. "A public school bus surveillance videotape capturing an altercation between students could be '[p]ersonal information in any files maintained for students in public schools.' Certainly, ...the student file exemption does not manifestly exclude that possibility." *Id.* at 333-34. The judges did agree the Lindemans were entitled to access primarily because the school district had earlier granted them access.

without written parental consent, to the public, except as specifically provided in [State law].” *Id.* at 53. The Court of Appeals agreed with the School Board and affirmed the trial court.

There is a difference between records the Legislature has determined to be exempt from The Florida Public Records Act and those which the Legislature has determined to be exempt from The Florida Public Records Act and confidential. If information is made confidential in the statutes, the information is not subject to inspection by the public and may only be released to the persons or organizations designated in the statute. ...

If records are not confidential but are only exempt from the Public Records Act, the exemption does not prohibit the showing of such information. [Citations omitted.] Once an agency released to the public certain information the Legislature has protected from disclosure by a Public Records Act exemption, no further purpose is served by the exemption and full public access to the information is warranted. [Citation omitted.]

Id. at 53-54. Records declared confidential under Florida law do not lose this characteristic through redaction. The records remain confidential and are exempt from disclosure except as permitted by statute. *Id.* at 56-57.

State Law versus FERPA

WFTV requested the court to construe Florida law *in pari materia*¹⁷ with FERPA. The court declined, noting numerous differences, including a general one whereby Florida law protects education records through a blanket designation as confidential records, whereas “FERPA does not prohibit the disclosure of any educational records.” *Id.* at 57-58. In addition, some “courts have interpreted FERPA to allow federal fund recipients to release education records redacted of personally identifiable information contained therein.” *Id.* at 58. The relative enforcement mechanisms also differ significantly, with Florida providing judicial recourse but FERPA preventing a private cause of action. *Id.* at *n.* 7, citing in part *Gonzaga University v. Doe*, 536 U.S. 273, 122 S. Ct. 2268 (2002).

A harmonious construction is also prevented by the language and scope of the two laws. Florida law prohibits access to “personally identifiable records or reports of a pupil or student, and any personal information contained therein,” while FERPA protects only “personally identifiable information” within a pupil’s education record, but does not prevent disclosure of other information (*i.e.*, “directory information”).

¹⁷Literally, “in the same matter.” Where two laws relate to the same matter or same subject, resort to the language in one law may resolve inconsistencies in the other law.

The State of Florida goes beyond the funding conditions specified in FERPA and protects the privacy of its students in its educational institutions by preventing the release of “any personal information” contained in records or reports which permit the personal identification of a student. “Personal information” is more encompassing than “Personally Identifiable Information.”

Id.

Other Cases of Interest

1. *Brock v. Independent School District No. 1*, 5 P.3d 981 (Idaho 2000) (School bus driver was reprimanded for removing a video camera from her bus, which was placed there to monitor her interaction with students. Court upheld reprimand.)
2. *Thompson v. Johnson County Community College*, 930 F.Supp. 501 (D. Kan. 1996), *affirmed without opinion*, *Thompson v. Johnson Co. Comm. College*, 108 F.3d 1388 (10th Cir. 1997). The college set up “video only” (no sound) surveillance of a locker room/storage area used by security personnel. This installation occurred after college officials received complaints of theft and allegations that some night shift security officers were bringing weapons onto campus and storing them in the lockers. The federal district court rejected claims of the security personnel that the warrantless video surveillance violated the Fourth Amendment. The security personnel locker was not an area that could be considered “private.” It was more analogous to hallway lockers in a school. The lockers were also part of a storage area where the college maintained its heating and air-conditioning equipment. Access to this area was not limited to security personnel. Numerous people had unfettered access. Given these facts, security personnel could not have had a reasonable expectation of privacy.
3. *Brannen, et al. v. Kings Local School Dist.*, 761 N.E.2d 84 (Ohio App. 2001) (Video cameras were installed in the break room after the supervisor of the custodians believed the third shift custodians were not working during significant portions of their shift. The video recorded images only, and did not record sound. Four custodians were subsequently sanctioned for unauthorized breaks. The custodians sued, alleging the hidden video camera constituted an unlawful search in contravention of the Fourth Amendment. The court disagreed. There was no reasonable expectation of privacy for public school’s break room used by third shift custodians because teachers and principal also had “unfettered access” to the break room.)

COURT JESTERS: COGITO EGGO SUM¹⁸

Charles Jay Wolff has been imprisoned in the New Hampshire State Prison since 1996. He has had a running battle with the Department of Corrections over what he perceives to be a violation of his constitutional right to free exercise of religion through the purported failure of prison employees to provide him with a religiously and nutritionally acceptable kosher diet.¹⁹ Wolff complains that the pre-packaged shelf-stable kosher meals provided to him are inadequate to meet his medical and nutritional needs, and make him sick. Prison officials assert that Wolff had been observed on several occasions eating non-kosher foods, notably scrambled eggs.

Eggs figure prominently into the continuing brouhaha. At one point, Wolff sought a preliminary injunction against prison officials. As a part of his filing with the Federal court, he submitted a hard-boiled egg. The Federal district court judge wisely delegated disposition of Wolff's injunction request to the magistrate, who reviewed Wolff's filing and his "exhibit." Magistrate James R. Muirhead must have been in an egg-alitarian mood. On the one hand, he did not wish to be dismissive of any procedural rights Wolff may have; on the other, he did not wish to egg him on. Magistrate Muirhead, inspired by Dr. Suess, issued a brief but interesting Order regarding the admission of the proffered "evidence."

No fan I am
Of the egg at hand.
Just like no ham
On the kosher plan.

This egg will rot
I kid you not.
And stink it can
This egg at hand.

There will be no eggs at court
To prove a clog in your aort.
There will be no eggs accepted.
Objections all will be rejected.

From this day forth

¹⁸This is not to be confused with "Cogito, ergo sum" (I think, therefore I am), the famous statement attributed to French philosopher and mathematician René Descartes. "Cogito eggo sum" translates roughly (*very* roughly) as "I think I am the Eggman."

¹⁹The background for this case is derived from the Federal district court's unpublished Order granting, in part, the defendant's Motion for Summary Judgment in *Wolff v. New Hampshire Department of Corrections*, Civil No. 06-cv-321-PB, Opinion No. 2008 DNH 071 (U.S. District Judge Paul Barbadoro, April 2, 2008).

This court will ban
hard-boiled eggs of any brand.
And if you should not understand
The meaning of the ban at hand
Then you should contact either Dan,
the Deputy Clerk, or my clerk Jan.

I do not like eggs in the file.
I do not like them in any style.
I will not take them fried or boiled.
I will not take them poached or broiled.
I will not take them soft or scrambled
Despite an argument well-rambled.

No fan I am
Of the egg at hand.
Destroy that egg!
Today! Today!
Today I say! Without delay!

Wolff v. New Hampshire Department of Corrections, 2007 WL 2788610 (D. N.H. 2007). Wolff was left with egg on his face. One of the problems may have been his decision to represent himself without benefit of l-egg-al counsel. He should have shelled out some moola. An attorney might have found legal precedent that would require the Federal court to accept the hard-boiled egg. Maybe in the Hatch Act?!

QUOTABLE . . .

A man should be able to find an education by taking the broad highway. He should not have to take by-roads through the woods and follow winding trails through sharp thickets, in constant tension because of the pitfalls and traps, and, after years of effort, perhaps attain the threshold of his goal when he is past caring about it.

Judge John Minor Wisdom, in *Meredith v. Fair*, 298 F.2d 696, 703 (5th Cir. 1962), addressing the efforts of James Meredith, an African-American, to enroll in the University of Mississippi. Also quoted in *Draper v. Atlanta Ind. Sch. System*, 518 F.3d 1275, 1279-80 (11th Cir. 1008).

UPDATES

STRIP SEARCHES

New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733 (1985), is the seminal U.S. Supreme Court decision regarding the constitutional limits on searches of students, especially within the public school context. *T.L.O.* established a two-fold inquiry for searches of students by school personnel where there is a reasonable suspicion to believe that a law or school rule has been broken.

1. The search must be “justified at its inception” (a law or school rule is being broken or there is a reasonable basis to believe such will occur); and
2. The search must be “reasonably related in scope to the circumstances which justified the interference in the first place.”

“[S]uch a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *T.L.O.*, 469 U.S. at 342, 105 S. Ct. at 743.

T.L.O., however, did not involve so-called “strip searches” of students.²⁰ Prior to *T.L.O.*, the U.S. Seventh Circuit Court of Appeals did have the opportunity to address the constitutionality of such a seemingly invasive search. In *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980), *reh. den.* 635 F.2d 582 (1980), *cert. den.* 451 U.S. 1022, 101 S. Ct. 3015 (1982), the 7th Circuit addressed a suspicionless “strip search” of students in search for contraband at an Indiana public school:

It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of school officials in permitting such a nude search was not only unlawful but outrageous under “settled indisputable principles of law.”

Doe v. Renfrow, 631 F.2d at 92-93, quoting *Wood v. Strickland*, 420 U.S. 308, 321, 95 S. Ct. 992, 1000 (1975).

Indiana courts have followed the *Renfrow* and *T.L.O.* holdings, generally finding disfavor with such procedures except where there are exigent circumstances that would warrant such invasive procedures.²¹ In *Oliver v. McClung*, 919 F.Supp. 1206 (N.D. Ind. 1995), the Federal district

²⁰A “strip search” of students typically involves the students being separated by gender and marshaled into an area of privacy where they are required individually to partially disrobe and pull their clothes away from their person, all in the presence of school personnel of the same gender.

²¹Circumstances that have warranted such invasive searches have included safety concerns, including reasonable suspicion of drug possession. These circumstances are often affected by the known

court found the public school violated the constitutional rights of middle school students when a “strip search” was performed on seventh-grade female students in search of missing money (\$4.50). The court noted there was no imminent threat of harm from weapons or drugs that would justify such a search.

Higginbottom v. Kiethly, 103 F.Supp.2d 1075 (S.D. Ind. 2000), began when \$38.00 turned up missing from an unattended snack cart, although this is the only fact the parties agreed to. According to the court, the sixth-grade teacher, a male, singled out four (4) sixth-grade boys as suspects and had them disrobe down to their underwear in the boys’ bathroom. After searching their clothing to no avail, the teacher had them pull out their underwear where he visually inspected their genitalia and buttocks to see whether the money had been hidden there. While this “strip search” was going on, the \$38.00 was discovered in the possession of another student from another class. The court granted in part and denied in part the school district’s and teacher’s Motion for Summary Judgment for claims arising out of a “strip search.”²² In denying the summary judgment motion, the court noted that “a reasonable jury could find that [the teacher] acted willfully or callously in so conducting that search.” 103 F.Supp.2d at 1090.²³

Michigan

“Strip searches” continue to occur. In *Beard, et al. v. Whitmore Lake School District, et al.*, 244 Fed. Appx. 607 (6th Cir. 2007), the U.S. Sixth Circuit Court of Appeals revisited a continuing dispute arising out of a strip search of high school students at a Michigan public school district. Most of these cases involve stolen money, often during a physical education class. *Beard* began the same way.

On May 24, 2000, a student reported to the physical education teacher that a “few hundred dollars” had been stolen from her purse. The teacher kept the students in the gymnasium and sent for the Acting Principal. The Acting Principal ordered the teacher and other school personnel to search the students. Although some objected, they were informed they had no choice but to comply. The male students were escorted to the shower room where they were required to drop their underwear to their ankles one at a time. The female students were taken to the girls’ locker room where they were required to pull up their skirts and pull down their pants while standing in a circle. The money was not found. The students were eventually released.

disciplinary history of the student or the reliability of the source of information. See, e.g., *Cornfield v. Consolidated High School District No. 230*, 991 F.2d 1316 (7th Cir. 1993), where a 16-year-old student with a significant disciplinary and behavioral history was suspected of “crotching” drugs. Justice John Paul Stevens, in *T.L.O.* (concurring in part and dissenting in part), also wrote that “to the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent and serious harm.” *T.L.O.*, 469 U.S. at 383, 105 S. Ct. 764, n. 25.

²²See “Strip Search of Students,” **Quarterly Report**, April-June: 2000.

²³The case was not tried to a jury. The parties settled the dispute. The court approved the settlement on July 5, 2000.

In the first appeal to the 6th Circuit, the court found that the strip search of the students did, indeed, violate the Fourth Amendment because the searches were performed in the absence of any individualized suspicion and without consent. The scope of the search was excessive and the character of the intrusion was invasive. The searches were unreasonable. However, the teachers were entitled to qualified immunity because the law at the time the searches were conducted did not clearly establish that such searches were unreasonable under the particular circumstances in this case. *Beard, et al. v. Whitmore Lake School District, et al.*, 402 F.3d 598 (6th Cir. 2005).

The return engagement focuses on the potential liability of the school district for the conduct of the teachers in carrying out the unconstitutional searches. The 6th Circuit found that the school district was not deliberately indifferent to the risk that its teachers might engage in unconstitutional searches nor did the school district have a custom of tolerating unconstitutional searches. Dismissal of the students' complaint against the school district was affirmed.

In finding for the school district, the 6th Circuit noted that the school district did, in fact, have policies in place addressing the search and seizure of students. The two-page policy (and five-page guidelines) specifically "directs that no student be searched without reasonable suspicion or in an unreasonable manner." A more comprehensive search would be permissible "only in the exceptional circumstances where health or safety of the student or others is immediately threatened." The guidelines specifically state that "[s]trip searches are to be conducted only by law enforcement personnel." 244 Fed. Appx. at 608-09.

Although the school district's policy and guidelines are available to the public, included in the student handbook, and provided to teachers, who are instructed to read the policy and guidelines, there had been no formal training session pertaining to this policy. *Id.* at 608.

There was an earlier incident in January of 2000 where a student complained that his wallet was missing, again following a physical education class. A search of student backpacks and pockets ensued. The wallet was discovered. The search did not involve any "strip search" of any student, however. *Id.* at 609-10.

The 6th Circuit relied upon *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989). In *City of Canton*, the U.S. Supreme Court held that Harris' civil rights claim was cognizable only where the city's purported failure to train its police force constituted a deliberate indifference to the constitutional rights of its inhabitants. There was no "obvious need" that would have alerted the school district to the need to provide specific training to its personnel in conducting constitutionally permissible searches.

In *City of Canton*, the United States Supreme Court explained that, in some circumstances, "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that policymakers of the city can reasonably be said to have been deliberately indifferent to the need" if those policymakers do not provide the "obvious" training. 489 U.S. at 390. Here, in contrast, the need for additional training was not "so obvious" to establish the District's deliberate indifference[.]

Id. at 611. The court cited several reasons in support of its determination the school district was not deliberately indifferent: (1) it was not “inherently foreseeable” that teachers would ignore the school district’s policy and guidelines and engage in excessive and unconstitutional searches of students; (2) although it was “obvious” the school district should have a policy on student searches, the need to provide training beyond the policy was not obvious; and (3) there was no evidence that teachers routinely encountered such situations where an unconstitutional search would occur without proper training; (4) it was not clear at the time of this dispute (May of 2000) that such a search was unconstitutional; and (5) a school district has numerous policies and procedures and cannot provide training for each issue that might arise; as a result, a school district has to focus on “obvious” risks and not every possible risk. *Id.* at 611-12.

The court also rejected the students’ assertions that there was a pattern of conducting unconstitutional searches. The January 2000 incident was the only other analogous search, but that one did not involve a “strip search.” “Clearly the strip search in May involved privacy interests far greater than those raised in the January search of backpacks and pockets.” *Id.* at 613. In any event, there was but one previous incident, which is insufficient to establish a pattern. It is also insufficient to claim the injury to the students would not have occurred had the teachers been properly trained.

The Court in *City of Canton* noted, “Neither will it suffice to prove that an injury...could have been avoided if an officer had had better or more training, sufficient to equip him [or her] to avoid the particular injury-causing conduct.” 489 U.S. at 391. The Supreme Court explained that “Such a claim could be made about almost any encounter resulting in injury.” *Id.*

Id. at 614. The 6th Circuit also declined to hold the school district liable under a theory of *respondeat superior*, an approach the Supreme Court also rejected in *City of Canton*. *Id.*, citing to *City of Canton*, 489 U.S. at 392.

Arizona

Redding v. Safford Unified School District #1, et al., 504 F.3d 828 (9th Cir. 2007) appears to be heading back for a second go-round. A divided (2-1) panel of the U.S. Ninth Circuit Court of Appeals found that a strip search of an eighth-grade girl in search of prescription pills was not unreasonable.

Savana Redding first drew the attention of the middle school teachers during a dance in August to mark the beginning of the school year. A small group of students was engaged in “unusually rowdy behavior.” Redding, who was then thirteen years old, was a member of this group, along with her friend Marissa. There was also a smell of alcohol emanating from this group. Later, staff members found a bottle of alcohol and a package of cigarettes in the girls’ restroom. No one was disciplined.

Several weeks later, another student (Jordan) and his mother spoke with the principal and vice principal. The mother reported that Jordan had become violent with her a few nights before and

had become sick to his stomach. Jordan claimed that he had taken some pills provided to him by a classmate. He also informed the administrators that certain students were bringing drugs and weapons to school. He provided specific information regarding several students, including Redding. He stated that Redding held a party prior to the August dance at which alcohol was served. 504 F.3d. at 829-30.

A week later, Jordan met with the vice principal. During this meeting, Jordan handed the vice principal a white pill, adding that Marissa gave it to him. He also reported that a group of students planned to take pills at lunch. The vice principal took the pill to the school nurse, who identified it as “Ibuprofen 400 mg,” a pill available only by prescription. *Id.* at 830.

The vice principal asked Marissa to leave her class and accompany him to the office. He noticed a black planner lying on the desk next to Marissa’s desk and asked her if this was hers. She denied it. The vice principal gave the planner to the classroom teacher. The teacher later discovered the planner held knives, lighters, a cigarette, and a permanent marker. The teacher informed the vice principal of this discovery.

The vice principal, with his administrative assistant, a female, observing, asked Marissa to turn out her pockets and open her wallet. This search uncovered a blue pill, several white pills, and a razor blade. The blue pill was later identified as an over-the-counter medication. The vice principal asked Marissa where the blue pill came from and she replied, “I guess it slipped in when she gave me the IBU 400s.” When asked who “she” was, Marissa identified Savana Redding. Marissa again denied any ownership of the black planner. Thereafter, the administrative assistant took Marissa into the nurse’s office and closed the door, where a strip search was conducted. No other contraband was discovered. *Id.*

The vice principal, meanwhile, asked Redding to accompany him to his office. Redding acknowledged the black planner belonged to her but claimed she had loaned it to Marissa so she could “hide some things from her parents.” Redding denied any knowledge regarding the contents of the planner. Redding also denied any knowledge regarding the pills uncovered during the search of Marissa and denied passing out pills to her classmates. Redding’s backpack was searched, but no contraband was discovered. The administrative assistant took Redding into the nurse’s office and conducted a strip search. Redding was asked to remove her jacket, shoes, and socks; remove her pants and shirt; pull out her bra and to the side and shake it, which exposed her breasts; and pull out her underwear at the crotch and shake it, which exposed her pelvic area. The search was fruitless. At no point during this strip search did the administrative assistant or the school nurse touch Redding. *Id.* at 831.

Redding sued the school district, the vice principal, the administrative assistant, and the school nurse, alleging that the strip search violated her Fourth Amendment rights. The Federal district court granted the defendants summary judgment, finding the search was justified at its inception and permissible in its scope. Redding appealed. A divided three-member panel (2-1) affirmed the district court’s decision.

The majority found that, based on the information available to school officials, there were “reasonable grounds” for suspecting the search of Redding would turn up evidence that Redding

either had or was about to violate the law or school rules. There were “several key pieces of information tying her to possession and distribution of pills in violation of school policy”: (1) Jordan informed the vice principal that Marissa possessed pills and had given one to him, and that a group planned to take pills at lunch; (2) the vice principal discovered pills on Marissa’s person; and Marissa volunteered that Redding provided her with the pills. *Id.* at 832.

The student informants’ tips “could give rise to reasonable suspicion sufficient to justify a search,” depending upon the indicia of reliability. The vice principal did not order the search of Redding based on an “uncorroborated tip.” Jordan’s information was provided face-to-face. The vice principal then took reasonable steps to investigate Jordan’s claims, which proved reliable. Marissa then implicated Redding. Prior to a search of Redding, however, the vice principal interviewed her about her knowledge of the pills and the contents of the planner.

It was only after Redding had acknowledged ownership of the planner, acknowledged her friendship with Marissa, and conceded that she had, in fact, lent her planner to Marissa with the express purpose of helping Marissa hide contraband from her parents, that [the vice principal] proceeded to order the challenged search.

Id. at 833-34. There were “ample facts” to support Marissa’s veracity as well. School employees witnessed Redding and Marissa socializing with the same group of friends at the August dance. Redding also conceded that she loaned her planner to Marissa to help Marissa conceal contraband from her parents. “The girls’ friendship and prior interactions made Marissa’s accusations against Redding credible.” *Id.* at 834. The vice principal could reasonably rely upon Marissa’s accusations to justify the further investigation and subsequent search of Redding. *Id.* In addition, Jordan’s earlier revelation that Redding served alcohol at her party prior to the August dance supported school personnel’s suspicions regarding Redding’s possible involvement in the distribution of pills. “While this allegation, in itself, would not have been enough to justify Defendants’ subsequent search of Redding, it was a relevant factor which the school officials were entitled to take into account.” *Id.*

The majority also found that the search was permissible in scope, relying in part upon *Cornfield v. Consolidated High School District No. 230*, 991 F.2d 1316 (7th Cir. 1993). There are several factors, mostly related to health and safety, that would justify an invasive search such as was administered to Redding.

1. The governmental interest at stake (barring unauthorized use of prescription drugs at school) is considerable, particularly given the “inherent risks posed by prescription drugs.” *Id.* at 835. Prior to any strip search, the vice principal had verified that the pill produced by Jordan was a prescription drug. Jordan’s mother earlier reported violent behavior and sickness on Jordan’s part resulting from the abuse of prescription drugs.
2. The size of the contraband is also a factor. School officials were searching Redding for pills, which are small and easily secreted. Redding’s person was searched only after contraband was not discovered in her backpack. It was also observed that Redding was wearing clothes that did not have pockets. It was not unreasonable, under these circumstances, to have Redding remove her clothing so that a search could be conducted.

3. The search was administered in a reasonable manner. The two employees who conducted the search were both of the same gender as Redding, and the search was conducted in the privacy of the school nurse's office with the door securely locked. Redding was not physically touched by either the administrative assistant or the school nurse. She was not asked to remove her bra or her underwear. "Under those facts, we cannot say that Defendants' search of Redding's person exceeded the permissible scope prescribed by the Supreme Court in *T.L.O.*"

Id. at 835-36.

Redding sought review by the U.S. Supreme Court. On January 31, 2008, the 9th Circuit ordered that the case be reheard *en banc*, adding that the decision of the three-judge panel is not to be cited as precedent by or to any court in the 9th Circuit. *Redding v. Safford Unified School District #1*, 514 F.3d 1383. The U.S. Supreme Court, on March 5, 2008, in light of the 9th Circuit's decision, dismissed Redding's petition for writ of certiorari. *Redding v. Safford Unified School District #1*, 128 S. Ct. 1497 (2008).

CANINE "SNIFFS" AND THE FOURTH AMENDMENT

Dogs have often been used in schools to sniff out contraband and associated paraphernalia. For over thirty years, state and federal courts have wrestled with the constitutional limits of dog-sniff programs.²⁴ Indiana has had its own challenge.

In *Myers v. Indiana*, 839 N.E.2d 1154 (Ind. 2005), *cert. den.*, 547 U.S. 1148, 126 S. Ct. 2295 (2006), a divided Indiana Supreme Court (3-2) upheld a trial court's decision to deny a high school student's motion to suppress evidence after he was charged with possession of a firearm on school property. Police discovered the weapon during a canine drug sweep of student lockers as well as vehicles in the school's parking lot.²⁵

In December of 2002, the Scott County School District authorized the police to conduct a drug search with trained dogs.²⁶ Students were held in their classrooms while the dogs sniffed the lockers and the cars in the school parking lot. Two dogs were used during the inspection. If one dog alerted to the scent of drugs, a second dog was brought in. If the second dog detected drugs, a school official would search the locker or vehicle. *Myers*, 806 N.E. 2d at 350 (Ind. App.

²⁴See "Canine 'Sniffs' and the Fourth Amendment: Implications for School-Based Searches," **Quarterly Report** October-December: 2006.

²⁵ The dogs were specifically sniffing for narcotics. One of the dogs "alerted" on Myers' car. A school administrator had Myers unlock his car. During the subsequent search of the car, the school administrator found the firearm. The court did not find relevant the fact that the search unveiled an item that the dog was not at the school to detect.

²⁶ Additional facts are taken from the Indiana Court of Appeals' opinion. *Myers v. Indiana*, 806 N.E.2d 350 (Ind. App. 2004).

2004). Both dogs alerted twice to the scent of drugs after sniffing Myers' vehicle. The assistant principal searched the car and found a loaded gun. *Id.* Subsequently, the student was charged with possession of a firearm. Myers moved to suppress the evidence for lack of a warrant or individualized suspicion. The trial court denied the motion. The defendant appealed to the Indiana Court of Appeals, which affirmed the trial court's decision. The Indiana Supreme Court granted transfer and affirmed (3-2) the denial of Myers' motion to suppress.

Myers argued that the search was unconstitutional. He asserted the search was not a school search but a police search; that the search was conducted without individualized, reasonable suspicion; and that the warrantless search was not justified by either his consent or the "automobile exception."²⁷ The majority rejected all these arguments.

In reaching its decision, the majority relied on *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834 (2005), which held that "a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Constitution." 534 U.S. at 410. Specifically, the *Caballes* court decided the matter on a narrow issue: "Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." *Id.* at 407. On this narrow issue, the answer was "no." The court even assumed that the "officer conducting the dog sniff had no information about the respondent except that he had been stopped for speeding." *Id.* In *Caballes*, a drug-sniffing dog alerted to the presence of drugs in Caballes' trunk while one police officer was writing him a ticket. When the second police officer opened the trunk, he found marijuana. *Id.* at 406.

Myers held where searches are "initiated and conducted by school officials alone or where school officials initiate a search and police involvement is minimal, the reasonableness standard is applicable." 839 N.E. 2d at 1160 (Ind. 2005). "[T]he ordinary warrant requirement will apply where 'outside' police officers initiate, or are predominantly involved in, a school search of a student or student property for police investigative purposes." *Id.* The court relied upon *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733 (1985), which articulated boundaries for searches conducted by school officials, finding such searches are not subject to the "probable cause" test but rather the "reasonableness" standard. The Indiana Supreme Court concluded that reasonable suspicion is not required for a narcotics dog to sniff the exterior of a vehicle "that does not involve an unreasonable detention of a person." 839 N.E.2d. at 1161.²⁸ Moreover, it found that

²⁷ The automobile exception is an exception to the warrant requirement. The exception applies when a vehicle's "ready mobility" excuses an officer from obtaining a warrant once there is probable cause to conduct a search. See *Myers*, 806 N.E.2d at 353-54 (Ind. App. 2004) (citations omitted).

²⁸ Other courts have indicated that a dog alert itself provides reasonable suspicion for school officials (or probable cause for police officers) to search the item that the dog alerted to. See, e.g. *State v. Barrett*, 683 So.2d 331, 339 (La. App. 1996) ("Once the drug detection dog alerted on the wallet, the principal had *probable cause* to suspect the wallet contained drugs and was justified in searching the wallet without a warrant.") (emphasis added); *Huff v. Ohio Dep't of Admin. Servs.*, 658 N.E.2d 356, 363 ("Once a trained dog alerts to the odor of drugs from a lawfully detained vehicle, an officer has *probable cause* to search the vehicle for contraband.") (citations omitted) (emphasis added).

the search was “reasonable because it was conducted after an alert by a police narcotics dog.” *Id.* The court noted that the school officials limited their searches only to those areas where the dogs alerted. *Id.*²⁹

The latest “dog sniff” case reported is from Tennessee. In *Hill v. Sharber et al.*, 544 F.Supp.2d 670 (M.D. Tenn. 2006), the public school district and the sheriff’s department had an arrangement whereby deputies would conduct random canine drug sweeps of the parking lots of the school district’s high schools. Neither the deputies who would conduct the sweeps nor school officials were provided notice until the morning of the day a sweep was to occur.

Two deputies were assigned to conduct a drug sweep on October 21, 2005. Enroute to one of the high schools, the deputies notified a school resource officer (SRO) of their intention to conduct a canine drug sweep using two trained drug dogs for this purpose. The SRO and the high school assistant principal were present for the sweep.

During the sweep, one of the dogs alerted to the possible presence of drugs in the car Hill drove to school. Hill was removed from class by school personnel and escorted to the car. Hill was informed that one of the dogs alerted to the presence of drugs in his car. He was read his *Miranda* rights and asked if he had drugs in his car. Although the deputies handcuffed Hill while they searched his car, the deputies maintained that he was not under arrest. Rather, they handcuffed him as a “routine officer/student safety measure.” *Id.* at 674, *n.* 5. The deputies searched Hill’s car, finding ten 12-ounce bottles of beer. Hill was issued a citation for underage possession of alcohol on school premises, freed from the handcuffs, and escorted back to school. *Id.* at 674.

The school initiated disciplinary proceedings against him. Because Hill was eligible for services under the Individuals with Disabilities Education Act (IDEA) as a student with a specific learning disability, the school conducted a “manifestation determination” meeting, as required by 20 U.S.C. § 1415(k)(1)(E).³⁰ Hill and his parents participated in the “manifestation

²⁹ The Indiana Supreme Court did not address whether the dog sniff itself was a “search.” This issue has already been decided by the U.S. Supreme Court. Dog sniffs are in their own category. A dog sniff is considered “*sui generis*” (unique) because it “discloses only the presence or absence of narcotics, a contraband item.” *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637 (1983) (“[N]o other investigative procedure [] is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.”). The court held that a sniff test by a trained narcotics canine is not a search within the meaning of the Fourth Amendment. See also *City of Indianapolis v. Edmond*, 531 U.S. 32, 40, 121 S. Ct. 447, 453 (2000) (“The fact that officers walk a narcotics-detection dog around the exterior of each car ... does not transform [a] seizure into a search.”); *State v. Watkins*, 515 N.E.2d 1152, 1155 (Ind. App. 1987) (“That the smell testing by the trained dog is not a search within the meaning of the Fourth Amendment is clear”), citing, *Place*, 462 U.S. at 707. These cases all involved searches of objects and not persons.

³⁰Also see 34 C.F.R. § 300.530(e). A “manifestation determination” meeting includes relevant members of a student’s team that is responsible for developing his Individualized Education Program or Plan (IEP). The student’s parents and the student may participate as well. Following review of all relevant information, the team is to decide whether the complained-of activity was caused by, or had a

determination” meeting. The team determined that Hill’s conduct was not a manifestation of his disability or the failure of the school district to implement his IEP. *Id.* at 674-75. Accordingly, he was assigned to the alternative school and suspended from extracurricular activities based on the school district’s “zero-tolerance policy.”³¹ His suspension from the classes and the hockey team lasted one month. *Id.* at 675.

Hill sued both school district personnel and the sheriff’s department, alleging, *inter alia*, violations of the Fourth Amendment (search and seizure), the Fourteenth Amendment (due process and equal protection), and the IDEA. *Id.*

Fourth Amendment

The Federal district court judge noted that searches within the context of public education need not require a warrant or probable cause in order to be constitutional, relying upon *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653, 115 S. Ct. 2386 (1995) (random, suspicionless drug-testing of public school students) and *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S. Ct. 733 (1985). The legality of the search will depend upon whether the search was justified at its inception and whether the scope of the search was reasonably related to the objectives of the search. The U.S. Supreme Court has not explicitly addressed the standard applicable where a search is conducted by law enforcement officials in a public school context. *Id.* at 676-77.

Hill argued that even should the *T.L.O.* standard apply because a school official was present during the search (the assistant principal), the search was still illegal because it did not comply with State law (“Tennessee School Security Act” or TSSA), which provides as follows, in relevant part:

When individual circumstances in a school dictate it, a principal may order that vehicles parked on school property by students or visitors...be searched in the principal’s presence or in the presence of other members of the principal’s staff.³²

* * *

A notice shall be posted where it is visible from the school parking lot that vehicles parked on school property by students or visitors are subject to search for drugs, drug paraphernalia or dangerous weapons.³³

direct and substantial relationship to, the student’s disability; or whether the conduct in question was the direct result of the school district’s failure to implement the student’s IEP. 20 U.S.C. § 1415(k)(1)(E)(i)(I), (II).

³¹See “‘Zero Tolerance’ Policies and Due Process,” **Quarterly Report**, July-September: 2000 for additional cases on this topic.

³²*Tenn. Code Ann.* § 49-6-4204(a).

³³*Tenn. Code Ann.* § 49-6-4204(d).

School officials conceded there was no posted sign to this effect in the lot where Hill parked, but Hill conceded that there was such a sign in the Main Lot. This issue, the court found, was a “red herring.”³⁴ *Id.* at 677.

As the search in question was conducted not by school officials but by law enforcement, it was not—nor was it required to be—conducted in keeping with the [Tennessee] statute, so long as it comported with the requirements of the Constitution. The Eleventh Circuit case of *Hearn v. Board of Public Education*, 191 F.3d 1329 (11th Cir. 1999) is instructive on this point. In that case, local police conducted a drug dog sweep of a school’s parking lot. A drug dog alerted to the possible presence of drugs in a car owned by a teacher, and a subsequent search of the vehicle revealed the presence of marijuana. The teacher was asked to take a drug test, refused, and was subsequently fired on the basis of a Board of Education policy that provided for drug testing of a school employee where there was a reasonable suspicion of drug use, and for termination if an employee refused to consent to the drug test.

Id. at 677-78. The 11th Circuit rejected the teacher’s arguments that the search violated the Board of Education’s policies. The sweep of the parking lot was a “law enforcement event” that would be limited only by the requirements of the Constitution.

The 11th Circuit’s reasoning would apply to Hill’s case as well. The TSSA governs actions initiated by school officials where there is individualized suspicion. The TSSA does not apply to events initiated by law enforcement. The fact that an assistant principal was present does not convert the exercise to one conducted by school officials. *Id.* at 678. It is immaterial, then, whether the school district was obliged to post a sign in the lot where Hill parked his car. *Id.* at 679.

The court reiterated, as did the Indiana Supreme Court in *Myers*, that a dog sniff does not constitute a search under the Fourth Amendment. See *United States v. Place*, 462 U.S. 696, 700-01, 103 S. Ct. 2637 (1983) and *Hearn*, 191 F.3d at 1332-33 (“A dog sniff of a person’s property located in a public place is not a search within the meaning of the Fourth Amendment.”). Law enforcement officers may sweep a parking lot with drug dogs without implicating the Fourth Amendment as individuals do not have a reasonable expectation of privacy in a parking lot that is accessible to the public. *Id.*, citing *United States v. Diaz*, 25 F.3d 392, 396 (6th Cir. 1994) (dog sniff of car parked in motel parking lot did not violate Fourth Amendment because law enforcement could lawfully enter the parking lot); and *United States v. Ludwig*, 10 F.3d 1523, 1527 (10th Cir. 1993) (random, suspicionless dog sniff is not a search subject to the Fourth Amendment so long as law enforcement is lawfully present in the area where the dog sniff occurred).

³⁴A “red herring” is a misleading clue. Its origin is said to have been related to the training of fox hounds. A red herring dragged across the trail of the fox provides a more pungent odor. A well trained hound will continue on the trail of the fox. The inferior hound will take off after the trail of the red herring.

The parking lot in this case was public school property. Even though one required a pass to park there, entry into the lot by the general public was not limited. Hill, then, had no reasonable expectation of privacy when he parked his car in the high school's parking lot. As a result, the sweep did not constitute a search under the Fourth Amendment. *Id.*

In any event, the law enforcement officials had probable cause following a positive dog alert. "A positive alert by a trained and reliable drug dog establishes probable cause." *Id.* at 679-80, citing in part to *Hearn*, 191 F.3d at 1332-33.

There is no dispute that the drug dog that made the alert on Hill's care was properly trained and possessed the requisite indicia of reliability. [Docket citation omitted.] Thus, the positive alert provided probable cause for the search of Hill's car. Moreover, the scope of the search was reasonable. The deputies searched the interior of the car and found alcohol within a duffel [bag] inside the car. As the duffel bag was a container that reasonably could have contained drugs, the probable cause generated by the drug dog's positive alert extended to the duffel bag, and the search of the bag thus was legal. *United States v. Ross*, 456 U.S. 798, 821-22, 102 S. Ct. 2157 (1982) (upholding search of bag located in trunk of car where there was probable cause to believe that the trunk contained drugs).

Id. at 680. The court found that the school defendants and law enforcement defendants were entitled to summary judgment on this claim. *Id.*

The court reviewed whether the handcuffing of Hill constituted an impermissible "seizure" under the Fourth Amendment. The fact that Hill was handcuffed during a search of his car does constitute a "seizure" for Fourth Amendment purposes. The U.S. Supreme Court has held that where law enforcement has a warrant based on probable cause to search an individual's home for contraband, law enforcement officials were authorized to detain the individual to prevent the risk of flight, minimize the risk of harm to the officers, and facilitate the completion of the search. *Id.*, citing to *Michigan v. Summers*, 452 U.S. 692, 702-03, 101 S. Ct. 2587 (1981). Such circumstances could also include the use of reasonable force, which could also include the use of handcuffs in certain circumstances. *Muehler v. Mena*, 544 U.S. 93, 98-99, 125 S. Ct. 1465 (2005).

The question in Hill's situation is whether the use of handcuffs—a greater intrusion than simple detention—was justified to prevent flight, minimize risk to the deputies, and complete the search. The court never addressed the question squarely. Rather, the court found that Hill was handcuffed for only ten minutes, and that such a minor intrusion is balanced against law enforcement's interests in minimizing risk, preventing flight, and completing the search, even though Hill did not act aggressively. *Id.* at 681. Summary judgment was awarded to the defendants on Hill's "seizure" claim under the Fourth Amendment.

IDEA Claims

The court quickly dismissed Hill's challenges under the IDEA that the manifestation meeting violated the IDEA because the search and seizure upon which the meeting was premised were illegal. The court noted that neither the search nor the seizure were illegal, granting summary judgment to the defendants. *Id.* at 681-82.

Fourteenth Amendment

The court found Hill's procedural and substantive due process claims, as well as his equal protection claims, to be too ill-defined. Hill provided no evidence that he was treated any differently from any other similarly situated student. He did not demonstrate that the school's disciplinary measures did not bear a rational relationship to the offense, nor did he show that application of the zero-tolerance policy violated due process to the extent the search of his car was illegal. The search of his car, the court noted, was legal. The court also found the "manifestation meeting" satisfied the requirements of due process as "his parents were given notice and an opportunity to be heard in the context of the Manifestation Meeting that took place before Hill was disciplined[.]"³⁵ *Id.* at 682. The defendants were entitled to summary judgment on Hill's Fourteenth Amendment claims.

Date: August 13, 2008

/s/Kevin C. McDowell
Kevin C. McDowell, General Counsel
Indiana Department of Education

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³⁵This finding by the court is of doubtful legality. A "manifestation meeting" is not designed as a due process procedure. Typically, a "manifestation meeting" precedes the actual fact-finding where it is actually determined an offense against a school rule has occurred.

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